91-1574

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1991

JOYCE PERKINS, PETITIONER

VS.

WESTERN SURETY COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where a case is brought to federal district court on diversity jurisdiction of the person, was it error for the United States District Court to exercise subject matter jurisdiction over the issue of attorney fees while said issue was being reviewed by the Mississippi Supreme Court as to whether Western Surety Company acted in good faith in incurring attorney fees and billing its fees to the Petitioner, Joyce Perkins?

2. Is it proper for a federal court to make rulings contrary to the highest court of a state in which the federal court is sitting, where such rule involves substantive rules of state law?

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1. 28 U.S.C. Section 725

2. 28 U.S.C. Section 1332

CASES

1. Erie v. Tompkins
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21 C.J.S. Courts Section 88.p. 136, 138.

IN THE SUPREME COURT OF THE UNITED STATES

JOYCE PERKINS PETITIONER

VS. NO. _____

WESTERN SURETY COMPANY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the Petitioner, Joyce Perkins, by and through her Attorney, Ceola James, and files this her Petition for a Writ of Certiorari, and Petitioner would set out the following matters in support thereof:

I.

QUESTIONS PRESENTED FOR REVIEW: (i) Where a case is brought to federal district court on diversity jurisdiction of the person, was it error for the United States District Court to exercise subject matter jurisdiction over the issue of attorney fees while said issue was being reviewed by the Mississippi Supreme Court as to whether Western Surety Company acted in good faith in incurring attorney fees and billing its

fees to the Petitioner, Joyce Perkins?

(2) Is it proper for a federal court to make rulings contrary to the highest court of a state in which the federal court is sitting, where such rule involves substantive rules of state law?

II.

STATEMENT OF JURISDICTION: (1) An Order was entered in this cause on the first day of October, 1991. An Order denying the Petition for a Rehearing was entered on the thirteenth (13th) day of November, 1991. See the Appendix for the opinions of the Courts rendered prior to this Petition.

THE BASIS FOR FEDERAL JURISDICTION which was asserted by Western Surety Company when it sued the Petitioner in the federal district court was based on diversity of citizenship, 28 U.S.C. Section 1332, since the parties were citizens of different states, and the matter in controversy exceeded $10,000.00. Petitioner had no objection to federal jurisdiction of the person, but the Petitioner has made a continuous objection to subject matter jurisdiction exercised by the lower Courts.

III.

CONSTITUTIONAL PROVISIONS: In federal Courts, except in matters governed

by Federal Constitution or by acts of Congress. the law to be applied in any case is the law of the state. 28 U.S.C. Section 725.

IV.

STATEMENT OF THE CASE: The Petitioner invokes the jurisdiction of the Supreme Court of the United States that are based on the following grounds:

1. The United States Court for the Southern District of Mississippi, Western Division, has rendered a decision, and the United States Court of Appeals for the Fifth Circuit has affirmed a decision which conflicts with a decision made by the Supreme Court of the State of Mississippi, which is a state Court of last resort. This decision was also made on the same parties that are before this Court. See Perkins v. Thompkins, 551 So. 2d 204, 210, (Miss 1989).

2. The decision sought to be reviewed by the Petitioner also conflicts with other

land mark federal court decisions which prohibit federal courts from making state law by forum shopping in federal Court based on diversity of citixenship. See Erie V. Tompkins, 58 S. Ct. 817 (1938), and Hanna v. Plumber, 85 S. Ct. 1136 (1965).

3. The decision sought to be reviewed by the Petitioner has sanctioned such a departure by the lower court, so as to merit a call for an exercise of this Court's power of supervision.

This case originated in the Chancery Court of Warren County, Mississippi. This case involves the contest of an estate based on a 1983 Mississippi Statute which allows an illegitimate child to inherit from its father.

Joyce Perkins asserted her claim as the natural daughter of Robert Taylor, the deceased. Western Surety Company was the bonding company for the administratrix, Joyce Perkins, who is the Petitioner in this case.

This estate is being contested by the aunts and uncle of Robert Taylor, the deceased. The case is on appeal for the second time to the Mississippi Supreme Court. Oral argument was had on August 15, 1991.

The attorney fees awarded to Western Surety Company by the Chancery Court was vacated by the Mississippi Supreme Court during the first appeal, and was remanded for the lower Court or Chancery court to consider whether Western Surety Company acted in good faith by participating throughout the entire case, and billing its fees to the Petitioner, Joyce Perkins.

On remand, the Chancery Court of Warren County again awarded excessive attorney fees to Western Surety Company. This case was appealed for the second time to the Mississippi Supreme Court. The Petitioner is contending that Western Surety Company is attempting to circumvent the jurisdiction of the Mississippi Supreme Court by filing for attorney fees in the United States

District Court while the reasonableness and necessity of its fees are being reviewed by the Mississippi Supreme Court

The multiple litigation filed by Western Surety Company was vexatious to the Petitioner, and it created a hardship for the Petitioner to litigate multiple claims on the same set of facts.

The record will show that the Petitioner paid money into the registry of the Chancery court that the Court had disbursed to her to prevent Western Surety Company from being exposed to any liability, but Western Surety Company sent its attorney to sit in on the case and billed its attorney fees to the Petitioner, despite the fact that the Petitioner had hired several attorneys to participate in the case at various stages since her attorney was a sole Petitioner.

Western Surety Company should not be allowed to prevail on a $75,432.47 judgement in federal court that would not be upheld in state Court. Western Surety Company

should not be allowed to circumvent state law by filing a suit based on diversity in order to forum shop for a different ruling. The failure of the federal district court to follow state law by requiring Western Surety Company to act in good faith in incurring attorney fees would cause Western Surety Company to choose federal Court in order to avoid the requirement of good faith action or performance. This case is of great public importance because it will cause surety companies to be viewed in a different manner if the Court will uphold the duplication of services by the surety company that insists on having its attorney sit throughout the contest of an estate and bill its fees to the principal. It will defeat the purpose of having an estate if the surety company is allowed to absorb all of the fees of the estate and to obtain excessive judgements against the beneficiary or administratrix of an estate.

The United States District Court interfered with the subject matter jurisdiction of the Mississippi Supreme Court when it ruled for Western Surety Company on the issue of attorney fees while at the same time the issue of whether Western Surety Company acted in good faith was and is pending in the Mississippi Supreme Court. The United States District Court did not inquire into the good faith actions of Western Surety Company, but it made its ruling as a matter of law by granting a preemptory ininstruction.

The federal court, in exercising subject matter jurisdiction, failed to realize that the Mississippi Supreme Court was enterentertaining a **rule making decision** on what constitutes good faith actions in the case on appeal. In federal court, the law to be applied is the law of the state in which the federal court is sitting. There is no federal common law, and congress has no power to

declare substantive rules of common law. The phrase, "laws of the several states," is held to include not only state statutory laws, but also the state decisions on questions of general law. These rules of law were announced in the case of Erie V. Tompkins, 58 S. Ct. 817.

In interpreting good faith actions, all facts must be before the Court. If all of the facts are not before the Court, the Court cannot rule, as a matter of law, that Western Surety Company acted in good faith. The fact that the contract was valid on its face, and the fact that diversity of citizenship existed is immaterial. In the case of Perkins v. Thompson, 551 So. 2d 204, 210, (Miss 1989), the Mississippi Supreme Court had already vacated the award of attorney fees in the amount of $39, 155.65, as it questioned whether the fees were reasonable and necessary, On remand, the lower Court cut the fee to $35,000.00. The

fee of $35,000.00 is still being reviewed by the Missisippi Supreme Court. In the first decision, the Mississippi Supreme Court ruled that idemnity contracts must be performed in good faith. While the Mississippi Supreme Court is pondering a **rule making decision on the good faith performance of Western Surety Company** in the performance of its idemnity agreement with the principal, Joyce Perkins, the Court can see the interference with both the **rule making power** and **subject matter jurisdiction** of the Mississippi Supreme Court when Western Surety Company goes into federal district court based on diversity of citizenship, and sues the Petitoner for an additional $75,032.47 which it charged in litigating the second appeal of the case. This amount was double the amount that is now on appeal.

The Mississippi Supreme Court is a regularly constituted court, and every regularly constituted court has power to do all

things reasonable necessary for the administration of justice within the scope of its jurisdiction, and for the enforcement of its judgements and mandates. 21 C.J.S. Courts, Section 88. The exercise of subject matter jurisdiction by the United States District Court interfered with the first order or mandate of the Mississippi Supreme Court, since it had already been ruled that Western Surety Company should act in good faith in incurring its fees. By requesting fees more excessive than the fees that had first been vacated by the Mississippi Supreme Court, Western Surety Company set up a clear case of forum shopping, based on diversity jurisdiction, in order to obtain a different result in federal Court that could not have been obtained in the Mississippi Supreme Court. The actions of Western Surety Company were also designed to take the **rule making power** from the Mississippi Supreme Court which is the power to **declare its rules of**

substantive law.

Respectfully submitted,

CEOLA JAMES
ATTORNEY FOR PETITIONER

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WESTERN SURETY COMPANY PLAINTIFF

VS. NO. W88-0046-B

JOYCE PERKINS DEFENDANT

JUDGMENT

THIS CAUSE, having come on for trial on the 12th day of December, 1990, said parties having announced ready for trial, and evidence having been presented in open court on December 12 and 13, 1990, before a jury consisting of Robert Buttress, and five other good and lawful citizens of the Southern District of Mississippi, Vicksburg Division, and the Defendant having voluntarily dismissed with prejudice her counterclaim for abuse of process during the proceedings, and said jury having heard evidence, and having been instructed under the law by the Court and having

rendered the following verdict:

> "We, the jury, find for the Plaintiff, Western Surety Company, and against the Defendant, Joyce Perkins, in the amount of $75,032.47 ..."

IT IS THEREFORE ORDERED AND ADJUDGED that all counterclaims filed in this matter should be and hereby are dismissed with prejudice and further that the Plaintiff, Western Surety Company, do have and recover the sum of $75, 32.47 from Defendant, Joyce Perkins, together with interest at the rate of 7.02 % from this date, as well as any and all court costs.

ORDERED AND ADJUDGED this the 20 th day of December, 1990.

WILLIAM H. BARBOUR (S)*

CHIEF JUDGE

* NO PETITION FOR REHEARING WAS FILED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1025

WESTERN SURETY COMPANY — PLAINTIFF-APPELLEE

VS.

JOYCE PERKINS — DEFENDANT-APPELLANT

Appeal from the United States Court for the Southern District of Mississippi
(CA-W-88-0046 (B)

Before: Jolly, Davis, and Smith, Circuit Judges.

PER CURIAM:*

Western Surety Company brought suit in district court seeking reimbursement of attorneys' fees pursuant to an idemnity agreement contained in an administratrix

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that local rule, the Court has determined that this decision should not be published.

bond in which Perkins was the Principal. The jury awarded $75,032.47 to the Plaintiff. Defendant now appeals this verdict.

On appeal, Defendant argues that the District Court intrfered with the jurisdiction of the Mississippi courts, because there is a case pending in state court in which Defendant is appealing an award of attorneys' fees and expenses awarded to the Plaintiff. The Defendant also contends that the district court improperly gave the jury a preemptory instruction. Defendant claims that there is no statutory authority for granting attorneys' fees to a loosing party. and that that granting the fees before the case in state court is decided would be premature.

We affirm the district court's judgement. The district court has subject matter jurisdiction and personal jurisdiction.[1] A

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[1]The district Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 1332, diversity jurisdiction. Jojce Perkins

separate case pending in the Mississippi Supreme Court did not bar the district Court from hearing the case.

The case now pending in the Mississippi Supreme Court involves an appeal by Perkins of the Chancery Court's Order awarding the Defendant $35,000.00.[2] The award was for the attorney's fees incurred by Western Surety Company through September 30, 1987. The suit brought by Western Surety in district court was for attorneys' fees incurred after October 1, 1987. Because the cases involved attorneys fees incurred during two different time periods, the issues of whether they were reasonable and

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is a resident of North Carolina, The matter in controversy exceeds $10.000.00. The district court had personal jurisdiction jurisdiction pursuant to the contracts branch of the Mississippi Long Arm Statute contained in Miss. Code 1972, Section ;3-3-57. Western Surety Company is qualified to do business in Mississippi, and Perkins entered into a contract to be performed in whole or in part in Mississippi.

[2]The Chancery Court originally awarded Western Surety Company $39,155.65

necessary are different. The district court did not interfere with the jurisdiction of the Mississippi courts by hearing a case that involved attorneys' fees and expenses for a different period of time than those being litigated in state court.

The district court properly gave the jury a preemptory instruction on liability, requiring it to find for Western Surety, submitting to the jury only the determination of reasonable and necessary attorneys' fees and expenses. Perkins never questioned the

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for reasonable and necessary attorneys' fees it incurred through September 30, 1987. Perkins appealed this Order to the Mississippi Supreme Court. The Mississippi Supreme Court vacated the Order, and remanded the case to the Chancery Court in order for it to determine "whether it was necessary for Western Surety Company to employ separate counsel to protect its interest, whether the surety acted in good faith in incurring those expenses with its principle, and lastly, whether the fees and expenses claimed were reasonable in amount." Perkins v. Thompson, 551 So. 2d 204, 210 (Miss 1989). On remand, the state trial Court found that the expenes were necesary and reasonable, snd it awarded the Plaintiff $35, 000.00. The appeal of the second Order is now pending before the Mississippi Supreme Court.

validity of the idemnity provision in the contract. The award of attorneys' fees is not based on any statutory authority, and does not depend on the outcome of the case now on appeal in the Mississppi Supreme Court.

For the reasons stated above, the Order of the district court is

A F F I R M E D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1025

WESTERN SURETY COMPANY — PLAINTIFF-APPELLEE

VS.

JOYCE PERKINS — DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING

(November 13, 1991)

BEFORE: JOLLY, DAVIS, AND SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

ENTERED FOR THE COURT:

(s).JOLLY
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, Ceola James, do hereby certify that I have this day mailed, postage prepaid, by first class mail, three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to: Hon: Calvin L. Wells, P.O. Box 1970, Jackson, MS 39215-1970.

THIS THE 11th DAY of February, 1922.

Ceola James

CEOLA JAMES
ATTORNEY FOR PETITIONER